IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

B. JEAN WEBB,	)	
Plaintiff,	)	
	)	
v.	)	Case No. 98-3306-CV-S-RGC-ECF
	)	
CITY OF REPUBLIC, MISSOURI,	)	
Defendant.	)	

REPLY SUGGESTIONS TO DEFENDANT'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On May 3, 1999, plaintiff filed a motion for summary judgment. Doc. 32. Under Local Rule 7.1(d) and Fed. R. Civ. P. 6, defendant's Suggestions in Opposition were due on or before May 18, 1999. Defendant filed its nineteen page Suggestions in Opposition on May 21, 1999, three days too late. Doc. 37. District courts have discretion to extend filing deadlines or to grant leave to file out of time "upon motion . . . where the failure to act was the result of excusable neglect." Fed. R. Civ. P. 6(b). See also Lujan v. National Wildlife Fed'n, 497 U.S. 871, 894-98, 110 S.Ct. 3177, 3192-93 (1990). Because defendant did not move for either an extension of time or leave to file out of time with the required showing of excusable neglect, the court should "reject [defendant's] untimely filed materials." African American Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345, 1350 (8th Cir. 1995), cert. denied sub nom, Tyus v. Bosley, 516 U.S. 1113 (1996).[1]

[1] Instead of beginning with "a concise listing of material facts as to which the party contends a genuine issue exists" as required by Local Rule 56.1(a), defendant's Suggestions in Opposition begin with four pages of argument about whether "genuine issues of material fact exist." Doc. 37, pp. 1-4. Because these pages are more properly characterized as arguments than as facts, they should count against the 15 page limit set forth in Local Rule 7.1(f), and the court should find that defendant's Suggestions exceed the page limit by four pages.

On the merits, defendant argues that the court should not apply Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), in this case because "support for the test from Lemon has eroded over the years[.]" Doc. 37, p. 8. In support of this premise, defendant relies almost exclusively on dissenting opinions. Doc. 37, pp. 8-11. The problem with defendant's argument is that, despite criticism, Lemon and its progeny remain good law, and the Lemon test remains by far the most widely used analytical framework for Establishment Clause decisions by federal courts. See, e.g., Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 2655 (1992) (reconsideration of Lemon unnecessary); Harris v. City of Zion, 927 F.2d 1401, 1411 & n.10 (7th Cir. 1991), cert. denied, 505 U.S. 1218 (1992); A.C.L.U. v. City of Stow, 29 F. Supp. 2d 845, 848 (N.D. Ohio 1998) (collecting cases).

Instead of the Lemon test, defendant urges the court to apply the coercion test advocated by Justice Kennedy in dissent in Allegheny County v. A.C.L.U., 492 U.S. 573, 659, 109 S.Ct. 3086, 3136 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), or the historical test applied in Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983). The coercion test is easy to dispense with because a majority of the Supreme Court has never adopted or applied it.[2] The court should also decline defendant's invitation to apply the historical test because no court has applied such an analysis in a governmental seal case. All of the courts

[2] In any event, application of the coercion test would yield a result in favor of plaintiff. As Justice Kennedy noted, "Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case. I doubt not, for example, that the Clause forbids a City to permit the erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." Allegheny County v. A.C.L.U., 492 U.S. 573, 661, 109 S.Ct. 3086, 3137 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (citing with approval Friedman v. Board of County Comm'rs of Bernalillo County, 781 F.2d 777 (10th Cir. 1985) (en banc), cert. denied, 476 U.S. 1169 (1986)).

considering such cases have applied Lemon. See Suggestions in Support of Plaintiff's Motion for Summary Judgment (hereafter "Suggestions in Support"), Doc. 36, p. 8.[3]

Defendant also contends that "there are genuine issues of material fact in dispute in this case." Doc. 37, p. 1. Defendant's Suggestions then list only three allegedly disputed factual issues: (1) "The issue of causation" of plaintiff's injuries, particularly the harassment plaintiff endured before moving from Republic to Springfield in December 1998 (Doc. 37, pp. 1-4); (2) "whether a reasonable observer, familiar with the history of the Defendant community and the history of the symbols found on the city seal, would perceive the display of Defendant's city seal as an endorsement of religion in general, or Christianity in particular"[4] (Doc. 37, p. 4); and (3) "[w]hether Plaintiff's claimed injuries [from the payment of taxes to the City] continue despite her relocation from Republic to Springfield, Missouri" (Doc. 37, p. 4).

Defendant does not controvert any of the facts specifically set forth in plaintiff's Suggestions in Support (Doc. 36, pp. 1-5). Local Rule 56.1(a) provides that "All facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party." Because defendant has failed to controvert any

---

[3] Even if the court were inclined to apply Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983), the historical evidence here falls far short of that present in Marsh, where the tradition of legislative prayers dated back to the First Congress. Defendant has provided no evidence of an even remotely similar tradition of using patently Christian symbols on governmental seals. In fact, the Republic seal is quite new, dating to 1990. Instead, defendant points to a general tradition of religious acknowledgments, such as Thanksgiving Proclamations and "In God We Trust" on our money. This court should reject these arguments for the reasons set forth in A.C.L.U. v. City of Stow, 29 F. Supp. 2d 845, 851-854 (N.D. Ohio 1998).

[4] Defendant is incorrect in suggesting that the question of whether the City seal endorses religion is a jury issue. "[T]he ultimate conclusion as to constitutionality is a question of law." Hill v. Blackwell, 774 F.2d 338, 343 (8th Cir. 1985). The only possible question for the jury is whether the fish displayed on the City seal is a Christian symbol. As shown infra, however, defendant has failed to establish a genuine issue of material fact on that issue.

of the specific facts set forth in the Suggestions in Support (Doc. 36, pp. 1-5), those facts must now be deemed admitted. Local Rule 56.1(a).

Defendant's first and third issues go to the question of whether plaintiff has standing to sue. But the court disposed of the standing question when it specifically found that defendant's use and display of its City seal causes plaintiff actual harm[5] and, for that reason, denied defendant's motion to dismiss for lack of subject matter jurisdiction. See Order, Doc. 31.[6] "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2510 (1986) (emphasis in original). A fact is material if it "might affect the outcome of the suit under the governing law[.]" Id., 477 U.S. at 248, 106 S.Ct. at 2510. Because other uncontroverted harms give plaintiff standing, defendant's first and third issues are not material and cannot defeat plaintiff's motion for summary judgment.

Similarly, defendant's second issue (whether a reasonable person would view the fish on defendant's City seal as a Christian symbol) does not present a genuine issue of material fact that would defeat plaintiff's motion for summary judgment because no "reasonable jury could return a verdict for the nonmoving party." Id. Defendant's only evidence on this issue consists of the declaration and report of Ubaldo Stecconi, a semiotician and translator, who currently teaches Italian at American University in Washington, D.C.

---

[5] Specifically, the presence of a Christian symbol on the City seal causes plaintiff to avoid traveling to Republic for visits with friends and for religious exercises with sister Wiccans who live in Republic. Doc. 31. See also Plaintiff's Suggestions in Opposition to Defendant's Motion to Dismiss, Doc. 28, p. 2, & attached affidavit of plaintiff B. Jean Webb at ¶ 3.

[6] Although defendant's motion to dismiss was framed in terms of mootness, the court's finding of sufficient harm is decisive for all standing purposes because mootness is "'the doctrine of standing set in a time frame.'" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S. Ct. 1202, 1209 (1980) (citation omitted).

Initially, the court should reject defendant's expert evidence. "Federal Rule of Evidence 702 provides that expert testimony may be admitted if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue' and if the witness is 'qualified as an expert by knowledge, skill, experience, training, or education.'" Jenkins v. Arkansas Power & Light Co., 140 F.3d 1161, 1165 (8th Cir. 1998). Because, as plaintiff's evidence demonstrates, the interpretation of the fish symbol on the City seal "is within the knowledge or experience of lay people, expert testimony is superfluous." Ellis v. Miller Oil Purchasing Co., 738 F.2d 269, 270 (8th Cir. 1984). Furthermore, Dr. Stecconi is not qualified to give relevant expert testimony on the meaning of the fish symbol used on the City seal because he is semiotician and translator, not an expert in Christian history or American culture, and because he has only been in this country since January 1999 (see curriculum vitae, pp. 2-4). Because semiotics is simply irrelevant to the factual issues in this case, the court should hold that Dr. Stecconi's opinions are inadmissible under Fed. R. Evid. 402 and 702.[7]

Even if the court decides to admit defendant's expert evidence, Dr. Stecconi's report is simply insufficient to create a genuine issue of material fact, especially in light of plaintiff's significant and uncontroverted evidence showing that the fish symbol used in defendant's City seal has been used for centuries as a sign of Christianity. In his report, Dr. Stecconi opines:

> [T]he fish sign has a rich symbolic past and is still widespread among several communities of interpreters. . . . The sign of the fish was included in the seal of the City of Republic, Missouri with the explicit intention to represent a general feeling or idea of religiosity. Together with the other drawings and colors on the seal, it patently stands for the civic and moral values shared by its citizens. The treatment the plaintiff reserves for the sign, culled from available court documents, appears to overlook both its intrinsic multiplicity and intentions. Instead, the sign is stripped of its

[7] The court should also reject defendant's expert evidence because Dr. Stecconi's testimony could only confuse a jury. See United States v. DeLuna, 763 F.2d 897, 912 (8th Cir.) (linguistics expert properly excluded), cert. denied sub nom, Thomas v. United States, 474 U.S. 980 (1985).

> constituent parts and taken only as an iconic form to justify an interpretive style based on the receiver's own perceptions and beliefs. In this way, signs can be made to mean almost anything, often in highly imaginative fashion. When this happens, the boundary between the interpretation and the use of a sign has been crossed. This is irresponsible semiotic behavior, because it flouts the very foundations of semiotics, which ensure controlled thinking, civil discourse, and ultimately harmonious coexistence in the community.

Stecconi Report, pp. 6-7.

The fundamental problem with Dr. Stecconi's report is that it focuses on proving that plaintiff engages in unsound semiotic behavior when she sees the fish sign on defendant's City seal as a Christian symbol. But this litigation is not about plaintiff's subjective interpretation of the fish on the City seal. Instead, in keeping with the endorsement test set out in Lemon and its progeny, the court here must apply an objective test and determine how a reasonable person would view the fish symbol on the City seal. Plaintiff has assembled uncontroverted proof that the fish on the City seal is a Christian symbol and is seen as such by reasonable people. Suggestions in Support, Doc. 36, pp. 1-5. Fish symbols nearly identical to the fish symbol on the City seal have been used as Christian signs for almost two millennia and are currently used in popular American culture exclusively as signs of Christianity. For instance, in Greene County, Missouri, the fish is used as a Christian symbol by the Council of Churches of the Ozarks, a bowling alley (Lighthouse Lanes), a radio station (KWFC, "Your Constant Christian Companion"), a Christian bookstore (Christian Publishers Outlet), a Christian student organization at Southwest Missouri State University (Ichthus), and countless individuals who display the fish symbol on their cars. Id. Defendant does not address these facts.

Instead, Dr. Stecconi points out that a "multiplicity" of cultures from around the world have used "many religious representations of fish images through history." Report, p. 3. But Dr. Stecconi does not describe or provide photographs of these other representations of fish symbols.

Without such information, the bare fact that other cultures use fish as symbols is meaningless. Of course fish are important symbols in other cultures. But that begs the question. This case concerns how the fish symbol that appears on the City seal is used in this culture. It is irrelevant that other forms of fish are used as symbols in other cultures.[8]

Dr. Stecconi also argues that the plaintiff's view of the fish symbol is jaundiced because it ignores the intention of the City seal's designer (Mrs. Schexsnayder) and publisher (the City of Republic) that the fish represent all religions and the moral values of the community. First, such a focus on the City's intention is inconsistent with the Lemon analysis, which requires the court to determine whether a governmental practice endorses religion even when the government's purpose is secular. Lemon v. Kurtzman, 403 U.S. at 611-612, 91 S.Ct. at 2111. Second, Dr. Stecconi's focus on governmental intent is far too narrow because it would permit a government to ignore, either naively or maliciously, the accepted meaning of a particular symbol. An extreme example will demonstrate this flaw in Dr. Stecconi's argument. Assume that a government decided to use a swastika on its seal because the swastika has long been used by a "multiplicity" of cultures. The government's position would be historically correct but extremely nearsighted given the obvious fact that the swastika is offensive to many people because of its close association with Nazi Germany. 26 Encyclopedia Americana (Grolier 1999) at 91. Yet, according to Dr. Stecconi's assertion that correct interpretation of a symbol requires the viewer to focus on the government's intention, people who might find the swastika on the seal offensive would be guilty

[8] It is also irrelevant that people not intimately familiar with American culture do not understand the fish on the City seal as a Christian symbol. In fact, Dr. Stecconi's "rough and ready test" in which he showed the City seal to two Chinese friends to demonstrate that "a visual sign can produce many and possibly diverging interpretations" (Report, § 2.2, p. 2) is absurd and insults the court's intelligence.

of "irresponsible semiotic behavior" because they would be ignoring the government's benign intent in adopting the symbol.

Dr. Stecconi also misses the boat when he states that "For some people living in the American Mid-West, where Christianity is by far the most common religion, the symbol has likely lost its ancient undertones of secret propaganda, and has come to be associated with religiosity rather than a specific religion." Report, p. 4. First, Dr. Stecconi provides no proof for this assertion of fact, and -- given that he is not an expert in American culture and has lived in the United States for fewer than six months -- he is not qualified to express such an opinion. Second, this assertion is at odds with the plaintiff's evidence that the fish displayed on the City seal is used exclusively as a Christian symbol in current American culture. Likewise, the assertion conflicts with the expressed perceptions of individual Americans who, during the March 9, 1998 meeting of the Board of Aldermen and in petitions, letters, and e-mail messages to defendant, have commented that defendant's fish is a Christian symbol. Because defendant has not contested or even addressed plaintiff's evidence, the court should reject Dr. Stecconi's assertions and find that there is no genuine issue of material fact to preclude summary judgment.

Finally, defendant argues, without any supporting authority, that "it is inappropriate to use § 1983 as a vehicle for an Establishment Clause claim, as there are no individual rights, privileges, or immunities arising under the Establishment Clause for a party to vindicate." Doc. 37, p. 19. Although novel, this argument is dead wrong.

First of all, contrary to defendant's assertion, the Establishment Clause does protect individual liberties, whether denominated rights, privileges, or immunities. Specifically, the Establishment and Free Exercise Clauses of the First Amendment are "complementary clauses" which

have "'secured religious liberty from the invasions of civil authority.'" Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 15, 67 S.Ct. 504, 511 (1947) (citation omitted).

Second, "§ 1983 incorporates the Fourteenth Amendment which in turn incorporates various provisions of the Bill of Rights and applies them to the states." Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 (Shepard's McGraw-Hill 1991, 3d ed.) at 61. This is the so-called "double incorporation" doctrine. See Shapo, "Constitutional Tort: Monroe v. Pape and the Frontiers Beyond," 60 Nw. U. L. Rev. 277 (1965). The Establishment Clause of the First Amendment applies to state and local governments through the "liberty" provision of the due process clause of the Fourteenth Amendment. Everson, 330 U.S. at 15, 67 S.Ct. at 511. Thus, plaintiff satisfied the requirements of § 1983 when she alleged "facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment." Monroe v. Pape, 365 U.S. 167, 171, 81 S.Ct. 473, 476 (1961) (overruled on other grounds by Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978)).

Because the First Amendment's religion clauses share "the common purpose of securing religious liberty," Lee v. Weisman, 112 S.Ct. at 2665 (Blackmun, J., concurring), and because those clauses have been applied to the states through the Fourteenth Amendment, an Establishment Clause violation is fully cognizable under § 1983.

For these reasons, the court should find that there remain no genuine issues of material fact for trial and that plaintiff is entitled to judgment as a matter of law.

Respectfully submitted,

s/ Stephen Douglas Bonney
Stephen Douglas Bonney
Mo. Bar No. 36164
215 West 18th Street
Kansas City, MO 64108
Tel. (816) 221-2868
Fax: (816) 421-0255
ATTORNEY FOR PLAINTIFF

Certificate of Service

I certify that, on June 1, 1999, a copy of the foregoing document was mailed, postage prepaid to: David R. Huggins, National Legal Foundation, PO Box 341283, Memphis, TN 38184-1283, and James M. Kelly, 316 West Hwy. 60, PO Box 327, Republic, MO 65738, Attorneys for Defendant.

s/ Stephen Douglas Bonney